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12 Jewish Legal News, Inc.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JEWISH LEGAL NEWS, INC.,

Case No.: 3:23-cv-05064

Plaintiff,

COMPLAINT

v.

UNITED STATES DEPARTMENT OF
EDUCATION,

Defendant.

Jewish Legal News, Inc. (“JLN” or “Plaintiff”), by and through its undersigned counsel, alleges as follows:

1. This is an action under the Freedom of Information Act (“FOIA” or the “Act”), 5 U.S.C. § 552, for declaratory, injunctive, and other appropriate relief by the JLN against the United States Department of Education (“Department of Education,” “DOE” or “Defendant”).

2. JLN is an online news magazine located at www.jewishlegalnews.com that covers important debates and issues in the Jewish communities in the US, Israel, and worldwide.

1 3. By this action, JLN seeks to compel the Department of Education to comply with their
2 lawful obligations under FOIA to release the requested records in their possession regarding complaints
3 of antisemitism at American universities and colleges.

4 4. Defendant has improperly withheld the records requested by Plaintiff in violation of
5 FOIA and in opposition to the public's strong interest in obtaining information regarding the severity of
6 antisemitism on American universities and how complaints are being managed, processed, and reported.

7 5. Media reports indicate rising incidents of antisemitism on campus, yet the Department of
8 Education does not appear to be able to keep track of them, which further raises questions how DOE is
9 handling or responding to these complaints.

10 6. A bipartisan group of 84 lawmakers recently wrote to the Secretary of Education
11 requesting an explanation on how the DOE planned to respond to the increase in the backlog of
12 complaints addressing antisemitism received by the Office for Civil Rights, which rose from
13 approximately 10,000 cases in 2019 to more than 19,000 cases last year.

14 7. In processing Plaintiff's FOIA request alone, DOE admitted that it takes 185 (one
15 hundred eighty-five) business days on average to process each FOIA request. Defendant's admission is
16 openly flouting the legal requirement that agencies must substantially respond within 20 (twenty)
17 working days.

18 8. Federal Courts have jurisdiction to enjoin a pattern or practice of unlawfully withholding
19 or delaying information in response to FOIA requests even if a party's claim related to a specific FOIA
20 request is mooted. *See, e.g., Hajro v. United States Citizenship & Immigration Servs.*, 811 F.3d 1086,
21 1103 (9th Cir. 2016).

22 9. The records were requested on behalf of Plaintiff and Plaintiff is statutorily entitled to
23 disclosure of these records, which it seeks so that it may inform the public about this important issue.

JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction over this action and personal jurisdiction over Defendant pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

11. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B).

DIVISIONAL ASSIGNMENT

12. Pursuant to Civil L.R. 3-2(c) and 3-5(b), this action should be assigned under Civil L.R. 3-2(c) and (d) to the San Francisco / Oakland division because the action arose in San Mateo County, California.

PARTIES

13. Plaintiff Jewish Legal News, Inc. is a nonprofit California corporation located at 3 East 3rd Ave., Ste. 200, San Mateo, CA 94401.

14. Defendant Department of Education is an agency of the federal government within the meaning of 5 U.S.C. § 551, 5 U.S.C. § 552(f), and 5 U.S.C. § 702, which has possession, custody, and/or control of the records that Plaintiff seeks. The headquarters of the Department of Education is located at 400 Maryland Ave. SW, Washington, DC 20202.

FACTUAL ALLEGATIONS

Background

15. It has widely been reported that incidents of antisemitism are increasing.¹ Some of the most concerning reports of antisemitism are occurring at colleges and universities across the country.²

¹ See Associated Press. "Antisemitic incidents on rise across the U.S., report finds." PBS, 17 Apr. 2023, <https://www.pbs.org/newshour/politics/antisemitic-incidents-on-rise-across-the-u-s-report-finds> (last accessed October 3, 2023).

² See Leef, George. "Why Do Universities Tolerate Blatant Antisemitism?" National Review, 26 April 2023, <https://www.nationalreview.com/corner/why-do-universities-tolerate-blatant-antisemitism/> (last accessed September 29, 2023).

1 16. For instance, three dozen interviews with Jewish students recently showed stories of
 2 antisemitic harassment, including slurs endured in class, expulsions from campus clubs, eggs thrown at
 3 Jewish fraternities, swastikas carved into their dorm walls, Holocaust-denying flyers, and a growing
 4 feeling that they needed to conceal their Jewish identities to be accepted.³

5 17. Some students report being spat upon and harassed, while some campus groups have
 6 forced out those who support Israel.⁴

7 18. Hostility, including vandalism, threats, and slurs toward Jewish students on college
 8 campuses increased more than threefold to 155 incidents in 2021 from 47 in 2014, according to the Anti-
 9 Defamation League.⁵

10 19. In 2022, StopAntisemitism, a national watchdog organization, graded 25 colleges and
 11 universities across the United States on their effectiveness at mitigating and responding to Jew hatred.
 12 Out of the 25 schools analyzed, seven received an F, including one CUNY and two Ivy Leagues.⁶

13 20. Title VI complaints for antisemitic discrimination have recently been filed at several
 14 colleges and universities across the country, including the University of Vermont, the State University of
 15 New York, the City University of New York, Brooklyn College, George Washington University,
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20 21 ³ See Yellin, Deena. “Tired of hiding: Jews at US colleges face rising antisemitism from left and right.”
 22 23 *USATNetwork*, 24 June 2023, <https://www.usatoday.com/story/news/education/2023/06/24/rise-in-antisemitism-hate-crimes-jews-colleges/70346697007/> (last accessed September 28, 2023).

24 25 ⁴ See Belkin, Douglas. “Antisemitism Is Rising at Colleges, and Jewish Students Are Facing Growing
 26 27 Hostility.” *Wall Street Journal*, 14 Dec. 2022, <https://www.wsj.com/articles/antisemitism-is-rising-at-colleges-and-jewish-students-are-facing-growing-hostility-11671027820> (last accessed, September 28, 2023).

28 29 ⁵ *Id.*

30 31 ⁶ See Gindis, Mia. “New report by StopAntisemitism indicates rise of antisemitism in higher education.”
 32 33 *The Ticker*, 23 October 2022, <https://theticker.org/8965/news/new-report-by-stopantisemitism-indicates-rise-of-antisemitism-in-higher-education/> (Last accessed September 29, 2023).

University of Southern California, UC Berkeley Law School, and New York University have been filed with the Office of Civil Rights.⁷

21. According to one survey, 57% (fifty seven percent) of Jewish college students have witnessed or experienced antisemitism.⁸

22. Besides the problem of antisemitic discrimination itself, additionally, DOE does not appear to be able to handle the task of managing, responding, or formulating a solution to address the the volume of complaints.

23. DOE admits in its letter in response to Plaintiff's FOIA request regarding complaints of antisemitism that it is only able to process such FOIA requests at an average pace of 185 (one hundred

⁷ See Ring, Wilson. "U of Vermont Settles Ed Department Antisemitism Complaint." *AP News*, 3 Apr. 2023, <https://apnews.com/article/university-of-vermont-antisemitism-complaint-brandeis-center-67c5bfc55713a6660879de27f50f3a62> (last accessed September 28, 2023); Tress, Luke. "US Feds Launch Probe into Alleged Antisemitism at New York Public College." *The Times of Israel*, 9 June 2023, <https://www.timesofisrael.com/us-feds-launch-probe-into-alleged-antisemitism-at-new-york-public-college/> (last accessed September 28, 2023); Klein, Zvika. "Office of Civil Rights launching investigation against UC Berkeley Law School." *The Jerusalem Post*, 15 December 2022, <https://www.jpost.com/diaspora/antisemitism/article-725042> (last accessed September 29, 2023); Meyer, Ezra. "A Title VI Complaint at George Washington University." *The James G. Martin Center for Academic Renewal*, 26 April 2023, <https://www.jamesgmartin.center/2023/04/a-title-vi-complaint-at-george-washington-university/> (Last accessed September 29, 2023); Knox, Liam. "USC Faces Investigation Over Alleged Student Harassment." *Inside Higher Ed*, 26 July 2022, <https://www.insidehighered.com/news/2022/07/27/ed-launches-title-vi-investigation-usc> (Last accessed September 29, 2023); Tress, Luke. "Federal probe to investigate alleged antisemitic harassment at Brooklyn College." *The Times of Israel*, 4 Feb. 2022, <https://www.timesofisrael.com/federal-probe-to-investigate-alleged-antisemitic-harassment-at-brooklyn-college/> (Last accessed September 29, 2023); Tabac, Alden. "CUNY sued over failing to deal with antisemitic instances on campuses." *The Jerusalem Post*, 26 July 2022, <https://www.jpost.com/diaspora/antisemitism/article-713076> (Last accessed September 29, 2023).

⁸ See Suter, Tara. "Majority of Jewish college students have witnessed or experienced antisemitism: survey." *The Hill*, 08 Sept. 2023, <https://thehill.com/homenews/education/4194744-majority-of-jewish-college-students-have-witnessed-or-experienced-antisemitism-survey/> (last accessed September 29, 2023).

1 eighty-five) business days, an *astounding 165 (one hundred sixty-five) business days* beyond the 20-day
2 legal limit.

3 24. DOE's inability to keep track of and propose solutions to the crisis has attracted the
4 attention of lawmakers.

5 25. A group of 84 bipartisan lawmakers recently wrote to Education Secretary Miguel
6 Cardona ("Rosen/Lankford Letter") pressing for information on the Department of Education's plans to
7 resolve the backlog of investigations into campus antisemitism and improve protections for Jewish
8 students.⁹ See Exhibit "A".

9 10 26. The bipartisan Rosen/Lankford Letter cites a 2022 survey finding that 54% of Jewish
11 students feel that they pay a social cost for supporting the existence of Israel as a Jewish state. It also
12 observed that the overall number of complaints received by the Office for Civil Rights has risen from
13 approximately 10,000 cases in 2019 to more than 19,000 cases last year.

14 15 27. The lawmakers asked how DOE plans to help schools improve their reporting of
16 antisemitic incidents on their campuses, communicate best practices, provide assistance to schools in
17 ensuring civil rights protections for Jewish students, and ensure that students and others are familiar with
18 resources for addressing discrimination. The letter encourages the Department to continue to swiftly
19 investigate other pending cases and to continue to enforce federal civil rights laws against antisemitism
20 in all forms.

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26 ⁹ See Manning, Smith, Rosen, Lankford Bipartisan, Bicameral Letter to Secretary Miguel Cardona, 22
27 Aug. 2023, <https://www.rosen.senate.gov/wp-content/uploads/2023/08/Manning-Smith-Rosen-Lankford-Bipartisan-Letter-to-Education-Secretary-on-Campus-Antisemitism-8.22.23.pdf> (last accessed
28 September 28, 2023).

1 28. To further determine how DOE plans to decrease the backlog of complaints and address
2 systemic antisemitic at universities, JLN requested information through FOIA that would allow the
3 public to get a grasp on the volume of antisemitic complaints at universities.

4 **Plaintiff's FOIA Request**

5 29. On August 28, 2023, attorney Mark L. Javitch, on behalf of JLN, submitted a FOIA
6 request to DOE via the online FOIA portal ("the portal"). A true and correct copy of the request is
7 attached to this Complaint as Exhibit "B" and is incorporated by reference herein.

8 The Requests included:

9 10 1. Copies of all complaints related to allegations of antisemitism at
11 colleges and universities received by the Department from April 1, 2023 to May
12 30, 2023.

13 2. Documents detailing the number of resolved and unresolved
14 investigations into campus antisemitism, including a breakdown of how long
15 each case has been pending, the status of each case, any case summaries or
16 status updates, including documents or memos discussing strategies or plans the
17 Department has established to address and resolve this backlog.

18 3. Reports, guidelines, and communications concerning the Department's
19 initiatives and efforts to encourage the reporting of antisemitic incidents on
20 campuses, including any materials, resources, or best practice documents that
21 the Department has disseminated to schools to help improve their reporting
22 mechanisms and address discrimination.

23 4. Documents, memos, and plans related to the administration's strategy
24 for combating antisemitism on campuses, including any implementation
25 timeline and expected outcomes of this strategy.

26 5. Internal documentation, training materials, or communications that
27 discuss the use and application of the International Holocaust Remembrance
28 Alliance's working definition of antisemitism within the Department and its
guidance to educational institutions.

6. Internal documentation, training materials, or communications that
discuss the use and application of the Nexus working definition of antisemitism
within the Department and its guidance to educational institutions.

7. Documents, correspondence and policies regarding how Title VI should
apply to protect Jewish students against antisemitic discrimination.

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2 8. Any other FOIA requests and responses regarding complaints or
allegations of antisemitism on campus.
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4 Date Range: 8/1/21 to 8/1/23
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6 30. The Request complied with all applicable regulations regarding the submission of FOIA
requests.
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8 **Defendant's Treatment of Plaintiff's FOIA Request**
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10 31. Defendant initially acknowledged Plaintiff's request ("Request").
11 32. On August 28, 2023, Defendant sent an email assigning the request 23-02670-F. *See*
12 Exhibit "C".
13 33. On August 29, 2023, Defendant sent a letter seeking clarification on the date range. *See*
14 Exhibit "D".
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16 34. On August 29, 2023, Plaintiff clarified the date range as 8/1/21 to 8/1/23. Plaintiff
narrowed the request for all antisemitism complaints to a range of 4/1/23 to 5/30/23 only. *See* Exhibit
17 "E".
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19 35. On August 30, 2023, Defendant sent a letter stating that the Request had been updated to
the status of "In Progress." *See* Exhibit "F".
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21 36. On September 28, 2023, Defendant sent another letter. The letter stated "At this time,
22 your request is still being processed. We appreciate your patience as we work diligently to process your
23 request. Please be advised that the average request processing time is approximately 185 business days.
24 As this is an average, your request may take more time or may be processed sooner." *See* Exhibit "G".
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26 37. As of the filing of this Complaint, it has been more than 20 (twenty) working days since
JLN's Request was submitted and acknowledged. Defendant has failed to inform Plaintiff when it will
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1 process its request other than to state Plaintiff's request may take more or less time than 185 working
2 days.

3 38. No further information or communication concerning the Request has been received or
4 sent by Plaintiff.

5 39. As of the date of this filing, Defendant has failed to:

6 a. produce the requested records or demonstrate that the requested records are lawfully
7 exempt from production;

8 b. notify Plaintiff of the scope of any responsive records Defendant intends to produce
9 or withhold and the reasons for any withholdings; or

10 c. inform Plaintiff that it may appeal any adequately specific adverse determination.

FIRST CAUSE OF ACTION

Violation of FOIA for Failure to Comply with Statutory Deadlines

14 40. Plaintiff incorporates the foregoing paragraphs herein.

15 41. Defendant is an agency subject to FOIA.

16 42. Plaintiff submitted a request. Through the Request, Plaintiff properly asked for records
17 within the possession, custody and/or control of Defendant.

19 43. Defendant failed to make a determination with respect to Plaintiff's Request within the
20 working day deadline required by FOIA. 5 U.S.C. § 552(a)(6)(A).

21 44. Defendant did not claim that unusual circumstances existed warranting additional time
22 needed.

24 45. Defendant also failed to specify any date that the request would be completed, other than
25 stating the "average" processing time is 185 (one hundred eighty-five) business days, and that Plaintiff's
26 request may be handled sooner or later than that.

46. Plaintiff has and/or is deemed to have exhausted applicable administrative remedies with respect to the Request. 5 U.S.C. § 552(a)(6)(A); *id.* § 552(a)(6)(C).

SECOND CAUSE OF ACTION

47. Defendant is subject to FOIA.

48. Plaintiff submitted a request. Through the Request, Plaintiff properly asked for records within the possession, custody and/or control of Defendant.

49. Defendant failed to make a determination as to what documents are responsive within 20 (twenty) working days as required by law.

50. It appears that Defendant has no ability to process requests within the statutory time period. On the contrary, Defendant admitted that its average response time is 185 (one hundred eighty-five) working days.

51. Defendant could not inform Plaintiff of any specific date that it could process Plaintiff's request, other than stating it could take more or less than 185 working days.

52. A FOIA pattern or practice claim can be established through evidence of chronic delay and backlogs.

53. Defendant's systemic failure to manage antisemitism complaints has been manifested by its admission that its average response time is 185 business days (one hundred eighty-five), an astounding 165 (one hundred sixty-five) business days beyond what would be required to adhere to federal law. *See Exhibit "G".*

54. Defendant's letter did not indicate that it planned to address the illegal processing times.

55. Defendant's failure to organize and process complaints is so widespread that members of Congress have taken notice. In August 2023, a group of 84 (eighty-four) bipartisan members wrote a

1 letter demanding Defendant implement systemic changes to improve its processes for managing
2 antisemitism complaints. *See Exhibit "A".*

3 56. Plaintiff seeks an order requiring Defendant to make a determination as to all outstanding
4 antisemitism complaints within 30 (thirty) days.

5 **REQUEST FOR RELIEF**
6

7 WHEREFORE, Plaintiff respectfully requests that this Court:

- 8 1) order Defendant to conduct a reasonable search for all records responsive to
9 Plaintiff's Request, and to immediately disclose all non-exempt records responsive to
10 the Request in their entirety, as well as all non-exempt portions of responsive records;
- 11 2) declare that Plaintiff is entitled to disclosure of the records responsive to the Request;
- 12 3) enjoin Defendant from continuing to withhold any and all non-exempt records or
13 portions thereof responsive to Plaintiff's Request;
- 14 4) enjoin Defendant from its pattern and practice of FOIA violations;
- 15 5) declare that Defendant has a pattern and practice of violating FOIA;
- 16 6) enjoin Defendant from failing to make a determination as to all outstanding
17 antisemitism complaints;
- 18 7) award Plaintiff reasonable attorney's fees and costs reasonably incurred in this action
19 pursuant to 5 U.S.C. § 552(a)(4)(E); and
- 20 8) grant such other relief as the Court may deem just and proper.

21 Dated: October 3, 2023

22 Respectfully submitted,

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